

**Before the  
Federal Communications Commission  
Washington, DC**

In the Matter of	)	
	)	
Request for Waiver and Review of the Decision of the	)	
Universal Service Administrator by	)	
	)	
Lynn Public Schools	)	File No. SLD- 582501
Lynn, Massachusetts	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism	)	

**REQUEST FOR WAIVER AND REVIEW**

Lynn Public Schools ("School District"), by its representative, hereby requests that the Commission (1) waive its 60-day appeal rule; (2) review and reverse the Notification of Improperly Disbursed Funds ("Notice") issued by the Universal Service Administrative Company ("USAC") in the above-captioned matter;<sup>1</sup> and (3) order USAC to terminate its collections efforts against the School District immediately in connection with FRN Nos. 1614427 and 1614789.

**SUMMARY**

The School District understands that the very heavy burden of demonstrating to the Commission that good cause exists to waive the 60-day appeal rule rests squarely on its shoulders,<sup>2</sup> but it believes strongly that it can carry that burden.<sup>3</sup> As discussed in more detail below, around the time that USAC's Notice was arriving at the School District, a severe Nor'easter

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<sup>1</sup> Exhibit 1, USAC's Notification of Improperly Disbursed Funds, dated January 5, 2011.

<sup>2</sup> See *Request for Review of the Decision of the Universal Service Administrator by Agra Public Schools I-134, et al., Schools and Libraries Universal Support Mechanism*, File Nos. SLD-363747, *et al.*, CC Docket No. 02-6, Order (Wireline Comp. Bur. 2010) ("*Agra Public Schools Order*")

<sup>3</sup> 47 C.F.R. § 1.3. ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.")

combined with an enormous amount of snow was bearing down on it too. The storm whipped through Massachusetts causing substantial damage. In the aftermath of that storm, to help the Commonwealth in its recovery efforts, President Obama signed a Massachusetts Disaster Declaration, enabling the federal government to provide aid.

The storm caused considerable damage throughout the School District, especially to portable classrooms, and the weight of snow on the roofs of school buildings was causing serious structural issues and concerns. Suddenly and unexpectedly, the School District had its hands full. The School District officials who were responsible for overseeing repairs and logistics, a group that included the assistant business manager, *who was also responsible for handling all of the School District's E-rate applications*, had to act quickly and, for the next couple of months, stay extremely focused. Their first priority was to keep students safe, so they moved them out of damaged facilities and into other school buildings. Then they moved on to repairs. Since that time, the School District has been struggling to get back on its feet. On January 27<sup>th</sup>, to make matters worse, another big snowstorm walloped Essex County, where the School District is located.

Into this wintry mix came USAC's Notice of Improperly Disbursed Funds. It was dated January 5, 2011, but it arrived at the School District's administrative offices at just about the same time as the January 11-12, 2011 storm. Unfortunately, the post-storm emergency work in which the School District's assistant business manager/E-rate coordinator was engaged took up so much of his time and attention that he missed the 60-day deadline to appeal USAC's decision.

The problem, according to USAC, which, we submit, is not true, was that the School District had failed to provide documentation to show that it was using two E-rate supported switches and a universal power supply. The record, as we will show below, clearly did not support USAC's assertion, and worse, that USAC knew or should have known that to be the case. What this means, of course, is that USAC never should have issued a Notice to the School District in the first place, and that its decision was therefore arbitrary and capricious. No doubt, stripping a school district of badly needed E-rate funds for not appealing an arbitrary decision on time is consistent with the Commission's rules, but no doubt too, that would be terribly unfair. Surely it is in the public's and the E-rate program's best interests to waive the Commission's rules to allow an

aggrieved party to file an appeal late, if the decision was rendered arbitrarily, and especially where, as here, the case for waiver is even stronger because of other extenuating circumstances.

## REQUEST FOR REVIEW

### I. FACTS

**KPMG's Audit Finding.** After an E-rate audit in 2009, KPMG reported to USAC that the School District had violated program rules because it “did not install products [two switches and a universal power supply (“UPS”)] funded by the Schools and Libraries program more than one year after receipt.” (Emphasis added). The funding in issue was \$11,695. More specifically, KPMG found as follows<sup>4</sup>:

### EF–304.4

**Condition:**

The Beneficiary did not install products funded by the Schools & Libraries program more than one year after receipt.

Internal Connections FRNs:

- In Funding Year 2007, the Beneficiary received S&L funding for FRN 1614789 to purchase a Cisco 3560G 48 Port switch for Ford Elementary School that was received on February 1, 2008 which had not been installed as of April 3, 2009.
- In Funding Year 2007, the Beneficiary received S&L funding for FRN 1614427 to purchase a Cisco 3560G 48 Port switch and a APC Smart UPS 1500 for Hood Elementary School that was received on February 1, 2008 which had not been installed as of April 3, 2009.

Internal Connections/Basic Maintenance FRNs:

- During our site visits at LVTI MW, relative to FRN# 1323754, we noted that a Cisco Catalyst 2950 switch was uninstalled and not in use.

The uninstalled items were not being utilized for educational purposes.

In its finding, KPMG did not contend that the School District never received or never used the equipment. That is because it knew that the equipment had been installed on April 6. KPMG's only concern was that the School District did not install it quickly enough. The reason for the delay, so far as KPMG was concerned, was of no consequence. KPMG picked dates and did the math. For the start date, KPMG selected the equipment delivery date, even though the end of the wireless installation project would have made much more sense (see Reason for the Delayed

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<sup>4</sup> See Exhibit 2, KPMG's finding and the School District's response.

Equipment Installation below). KPMG calculated the difference between the start and install dates, determined that more than a year had elapsed between the two, and went on to conclude that for E-rate purposes that was “too” long a time. KPMG did not cite any Commission rule or decision to support its conclusion.

**Reason for the Delayed Equipment Installation.** On Friday, April 3, 2009, Daniel McManus, the School District’s Network Administrator, escorted KPMG’s E-rate auditors on school site visits. At Ford and Hood elementary schools, Mr. McManus and the auditors discovered that a switch at each of the schools and a universal power supply at Hood were missing, so Mr. McManus started looking for them. Much to his surprise, he found them unopened in their original boxes at each school. Immediately, he contacted CBE Technologies, Inc. (“CBE”), the company that the School District had retained to handle its E-rate supported IP telephony and wireless projects, to find out why these two particular switches and the UPS had remained boxed up all that time.

After investigating, CBE explained to Mr. McManus that the equipment should have been installed, that it had not been installed due to an inadvertent error, and that the company would rectify the situation right away and at no charge, of course, to the School District. On the very next business day, Monday, April 6<sup>th</sup>, CBE installed all of the equipment. At that point, Mr. McManus contacted KPMG to inform the auditing company that the “missing” equipment was in place and operating.

The reason for the mix-up, as CBE’s representative explained it to Mr. McManus and as Mr. McManus repeated it to KPMG, was this: CBE completed the Hood and Ford school projects in two phases, the IP Telephony System first and then the Wireless Network. At the beginning of the Wireless project, CBE delivered all of the equipment, including the switches and UPS, which were going to be installed last, to the respective school sites. The CBE technicians set the switches and UPS aside for installation later, after the wireless access points had been installed. There was an unexpected delay, however, because it turned out that both school buildings had to be extensively rewired before CBE could install the wireless access points. When the time finally came to complete the project by connecting the switches to the wireless access points, CBE assigned different technicians to the job. They did not know, unfortunately, that their colleagues,

who had been on the job first, had set aside new equipment to connect to the wireless access points – so, by mistake, they hooked up the old equipment that was already there.

**School District's Response to KPMG's Finding.** KPMG's finding revealed that the auditing firm was not interested in why anything had happened. To KPMG, time was the only thing that mattered. Therefore, in its response to KPMG's finding, the School District reminded the auditing firm, among other things, that CBE had completed the wireless installation on May 27, 2008,<sup>5</sup> and, after discovering its mistake, installed the remainder of the new equipment on April 6, 2009,<sup>6</sup> close to but still less than a year later. KPMG never responded.

**USAC Asks School District to Repeat its Explanation.** Almost one and a half years later, on September 29, 2010, USAC asked Thomas Bourque, the School District's E-rate coordinator and assistant business manager, to explain again why there had been a delay in installing the equipment.<sup>7</sup> "Based on a review of the documentation provided," USAC advised him, "we have determined that USAC may have improperly disbursed funds for FRNS 1614789, 1614427, because equipment was not utilized in accordance with program rules." USAC went on to list the switch at Ford Elementary School and the switch and UPS at Hood Elementary School, and then, besides for the boilerplate questions, asked the School District for only one piece of information: *"Please explain the reason for the delay in using the equipment."*

Mr. Bourque responded to USAC the same day, repeating the same explanation that the School District had given to KPMG, and providing invoices to document when CBE had completed the Wireless systems project work.<sup>8</sup> Mr. Bourque explained:

- The equipment was delivered to the school sites in February of 2008, right before the Wireless systems project was supposed to begin.
- The project had to be delayed because the schools required extensive rewiring.

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<sup>5</sup> See Exhibit 3 at pp. 3-4, invoices for labor for the completed project dated May 28, 2008.

<sup>6</sup> The response mistakenly said April 3<sup>rd</sup>. The install date was actually Monday, April 6, 2009.

<sup>7</sup> See Exhibit 3 at p.1 and 5, Request for Information from USAC to Tom Bourque/Lynn School District.

<sup>8</sup> See Exhibit 3 at pp. 2-4 and 5-6.

- Consequently, the CBE technicians, who were on the job at that time, set aside the switches and the UPS for installation at the end of the project.
- In May of 2008, CBE completed and connected the wireless network.
- To connect the wireless access points to the network at the very end of the project, CBE assigned new technicians, who did not know that the first CBE technicians on the job had set aside new switches and a UPS, so instead of connecting the wireless access points to the new equipment, they wound up connecting the wireless access points to the old equipment by mistake.
- The School District discovered the mistake on April 3, 2009, when KPMG brought the issue to the School District's attention.
- The School District contacted CBE immediately and the new equipment was installed within days.

**USAC Issues Notification of Improperly Disbursed Funds Recovery Letter.** In a Notice addressed to Mr. Bourque dated January 5, 2011, USAC advised the School District that it had disbursed funds improperly to help the School District pay for the two switches and the UPS that had been the subject of KPMG's finding, and, therefore, that it was going to seek recovery of those funds from the School District.<sup>9</sup> The ONLY thing that the School District had done wrong, according to USAC, was fail to provide USAC with "documentation to validate" that it was "using" the equipment. Specifically, this is what USAC found:

[FRN 1614427] *Requested documentation to validate that the Catalyst Cisco 356g 48 port switch...(\$6,172.00 pre-discount cost) and APC Smart UPS...(\$650 pre-discount cost) was being utilized was not provided by the beneficiary.* Since a review has revealed that equipment has not been utilized according to program rules, USAC must seek recovery of all funds improperly disbursed that are associated with the equipment not being utilized.<sup>10</sup>

[FRN 1614789] *The requested documentation to validate that the Catalyst Cisco 356g 48 port switch...(\$6,172.00 pre-discount cost) was being utilized was not provided by the beneficiary.* Since a review has revealed that equipment has not been utilized according to program rules, USAC must seek recovery of all funds improperly disbursed that are associated with the equipment not being utilized.<sup>11</sup>

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<sup>9</sup> See Exhibit 1.

<sup>10</sup> Exhibit 1 at p. 4.

<sup>11</sup> Exhibit 1 at p. 5

## II. DISCUSSION

### **A. USAC's decision is arbitrary and capricious because it was made without regard for the facts and circumstances and it disregards the evidence.**

The undisputed facts and circumstances that led up to USAC's decision to seek recovery of improperly disbursed funds from the School District are as follows: (1) the School District purchased two switches and a UPS in accordance with program rules; (2) because of an inadvertent mistake that the School District's contractor made, this equipment was installed approximately ten months late (beginning of April 2009, as opposed to the end of May 2008); (3) neither KPMG nor USAC ever questioned that the equipment was actually installed after the mistake was discovered – KPMG was only concerned about how long it had taken to install the equipment and USAC only wanted to know "why" there had been a "delay" in installing the equipment; and (4) USAC never asked the School District to provide it with documentation to validate that it was utilizing the equipment.

All of the foregoing notwithstanding, USAC still decided to issue to the School District a Notification of Improperly Disbursed Funds. USAC based its decision on the spurious and baseless assertion that the School District had failed to provide documentation to "validate" "utilization" of the equipment. This was an issue that USAC had never before questioned or even raised any doubts concerning. It is evident, therefore, that when USAC decided this matter, it did so without any regard for any of the specific facts and circumstances, and that it totally disregarded the evidence before it. Consequently, the decision was arbitrary and capricious and, for that reason, we respectfully request the Commission to reverse it.

### **B. The contractor installed the equipment within a reasonable amount of time, despite the honest mistake that led to the delay.**

Furthermore, the record in this matter shows clearly that CBE's mistake, which caused the delay, was an honest one, and that CBE rectified it as soon as it became aware of it. There is no evidence of waste, fraud or abuse or of any effort on the part of either party to get away with something. That the equipment was installed later than it should have been is beyond argument and certainly unfortunate, but, considering the long project delay and difficulties caused by the unexpected need to rewire the schools, it was still installed, we submit, within a reasonable amount

of time. To the best of our knowledge, the Commission has never articulated a hard and fast rule giving applicants only so much time to install their E-rate supported equipment. Because there are so many variables involved in the purchase and installation of internal connections, what is or is not a “reasonable” amount of time must be governed, ultimately, by the specific circumstances in each case.

**C. The Commission has instructed USAC not to seek recovery of “Equipment Not Utilized” in every case.**

In a letter to USAC dated January 16, 2009, the Commission gave USAC guidance concerning the recovery of E-rate funds.<sup>12</sup> USAC had recommended to the Commission that recovery be made in every instance in which equipment was not utilized, including cases where “equipment is still in its original packaging and has not been installed,” but the Commission disagreed.<sup>13</sup> In those kinds of cases, the Commission instructed USAC, “recovery depends on the individual situation.”<sup>14</sup>

Until USAC decided to do so in its Notice, neither KPMG nor USAC had ever framed the issue in this case as one of equipment not being utilized, but rather, of how long it had taken for the School District to begin utilizing the equipment. But even if USAC had framed the issue that way from the outset, recovery still would not be warranted. In its letter to USAC, the Commission offered the following example of circumstances where it would be inappropriate to recover funds.<sup>15</sup> In that case, human resources limitations caused installation of equipment to be delayed, but, the Commission noted, the school district anticipated that installation would occur shortly and installation actually did occur. In this case, as in that one, unforeseeable circumstances beyond the school district’s control led to the delay. It was CBE’s honest mistake, not the School District’s, which led to the delay in installation. The School Contract could not have foreseen it, and as soon as the problem came to light, the School District took steps to investigate and to ensure that the

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<sup>12</sup> Exhibit 4.

<sup>13</sup> Exhibit 4 at p. 2 (*Equipment Not Utilized*) and p.5, Issue No. 11.

<sup>14</sup> Exhibit 4 at p. 2 (*Equipment Not Utilized*).

<sup>15</sup> *Ibid.*



equipment got installed immediately – and it was. In this situation, therefore, just as in the Commission’s example, the equities involved do not support the recovery of funds.

## **REQUEST FOR WAIVER**

### **I. FACTS**

USAC’s Notification of Improperly Disbursed Funds Recovery Letter is dated January 5, 2011. Therefore, this Request for Review is clearly outside the 60-day appeal period. The School District understands why the Commission is loathe to waive its rules to accept late filed appeals, but the School District also understands that the Commission will accept them, if the applicant can show that extraordinary circumstances caused the applicant to miss the filing deadline. The School District believes it can do that.

The weather this winter in Lynn, Massachusetts has been absolutely extraordinary. It has caused a great deal of damage to School District facilities and monopolized the attention of the School District’s assistant business manager, Thomas Bourque, who doubles as the School District’s E-rate coordinator. In his fight these past few months to keep the School District’s students safe and its buildings secure and to keep disruption to learning to a minimum, what happened, quite frankly, was that USAC’s January 5<sup>th</sup> Notice lost the battle for his attention. Ideally, of course, that would not have happened. However, in the real world of limited staff and weather emergencies and a very foreign and complicated E-rate regulatory process, which makes understanding the key issues and crafting thoughtful appeals to cursory, poorly drafted USAC decisions an incredibly daunting task, inevitably, something is going to get lost in the shuffle. Of course Mr. Bourque and the School District wishes that it had not been this appeal, and that he would have been able to turn his attention to USAC’s Notice more quickly, but, unfortunately, that was not the case. The energy and focus that he needed to devote to helping to initiate, coordinate and oversee repair work and move students and teachers out of damaged buildings and into other, more secure ones made that impossible.

Mr. Bourque handles all E-rate correspondence for the School District. He was the staff person who addressed KPMG’s finding in this matter, as well as USAC’s September 29<sup>th</sup> question

about the reason why installation of the equipment had been delayed. As the School District's assistant business manager, Mr. Bourque is also the point person on all building-related matters, so when severe weather hits, he has to make sure that all of "his" school buildings are safe and, if they are not, it is his responsibility to ensure that students have safe places to go to continue receiving classroom instruction. In the best of times, his job is a big one; in an emergency, it becomes enormous.

On December 27<sup>th</sup>, the first huge snowstorm of the season hit Lynn, leaving 18 inches of snow on the ground.<sup>16</sup> On January 5<sup>th</sup> USAC was preparing its Notice and, on that day or shortly thereafter, mailed it out. Two days later, on January 7<sup>th</sup>, with an even bigger and more powerful storm headed Lynn's way, the Massachusetts Court System issued a press release notifying local communities that it was organizing crews of offenders to help with snow removal.<sup>17</sup> On January 12<sup>th</sup>, a powerful Nor'easter slammed into New England, bringing with it record amounts of snow and damaging winds.<sup>18</sup> Dangerous accumulations of snow piled up on roofs throughout the city, including the roofs of several school buildings, creating extremely dangerous conditions. The weight of the snow was causing serious structural concerns, especially for Mr. Bourque, who was responsible for monitoring the integrity of the School District's facilities, and he was becoming increasingly alarmed.

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<sup>16</sup> See <http://www.youtube.com/watch?v=4VhfzO5HgF4&feature=related> (driving through Lynn, MA); [http://douging.smugmug.com/Weather/winter-2010-2011/15450586\\_tGCa3/1/1153311106\\_vjFud#1153311106\\_vjFud](http://douging.smugmug.com/Weather/winter-2010-2011/15450586_tGCa3/1/1153311106_vjFud#1153311106_vjFud); <http://www.youtube.com/watch?v=3vfCOIJ5HYw>

<sup>17</sup> See <http://www.mass.gov/courts/probation/pr010711.html> ("As meteorologists predict snow and cities and towns throughout the Commonwealth anticipate clean-up, the Massachusetts Trial Court Community Service Program is organizing crews of offenders for snow removal duty. Our staff is fully prepared to assist all departments from courthouses to municipalities and non-profit agencies... Offenders performed nearly 3,000 hours of community service shoveling snow following last week's snowstorm which buried New England in 20 inches of snow.").

<sup>18</sup> See <http://sites.google.com/site/ncotoiawx/storm-potential/january-nor-easter>; <http://www.youtube.com/watch?v=ysb8CCzAErE&feature=related> ; <http://www.youtube.com/watch?v=b6dZxIPYwec&feature=related> (plow brigade)

Fortunately, no school roof collapsed during or after the storm, but the weight of the snow wound up damaging several buildings, portable classrooms in particular. Between the logistics involved in finding spaces for students in the damaged buildings to go, moving them, and overseeing repair work, Mr. Bourque knew that he was going to be incredibly busy and extremely stressed in the weeks to come and likely for the next couple of months or more, and indeed he was. Sometime during this difficult period, USAC's Notice arrived. Mr. Bourque examined it when it got there, but he found it very odd and confusing. He could not understand why USAC had issued it, considering all of the information and documentation that he had already provided, and the explanation that USAC offered provided little for him to go on. He is neither a lawyer nor a regulatory expert, and because he had urgent matters to attend to that required his immediate attention, he decided to set aside the Notice until he could find time to focus on it and figure out what exactly to do and what to say in response to it.

Unfortunately, the bad weather simply refused to let up. On January 27<sup>th</sup>, there was another major snowstorm,<sup>19</sup> and March 8<sup>th</sup> brought extremely heavy rains. On March 7<sup>th</sup>, President Obama "declared a major disaster exists in the Commonwealth of Massachusetts and ordered Federal aid to supplement Commonwealth and local recovery efforts in the area struck by a severe winter storm and snowstorm during the period o January 11-12, 20011."<sup>20</sup>

As already noted, the snow accumulation from the January Nor'easter damaged school buildings and caused a great deal of disruption. Hood Elementary School experienced severe water damage, for example, and the roof on the portable classrooms at Sisson Elementary School

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<sup>19</sup> <http://www.youtube.com/watch?v=bZpqJa7rimI&feature=related> ("A snow-weary region awoke yesterday to the month's third major storm, with snowfall in Boston challenging the record for January and potentially rivaling the all-time mark for one winter. Though the snow tapered off during the morning, the 9.9 inches measured at Logan and the foot or more that hit parts of the state continued to torment motorists, pedestrians, and public works crews."); [http://www.boston.com/news/weather/articles/2011/01/28/region\\_isnt\\_taking\\_massive\\_snow\\_accumulation\\_lightly/](http://www.boston.com/news/weather/articles/2011/01/28/region_isnt_taking_massive_snow_accumulation_lightly/) <http://www.wpri.com/dpp/news/massachusetts/lynn-roof-collapse-snow-may-be-to-blame-greater-lynn-senior-services> ; <http://www.youtube.com/watch?v=O6iW2OrycEc> (roof collapse/another bad storm)

<sup>20</sup> See Exhibit 5.

was leaking so badly that Mr. Bourque had to relocate the four classrooms there to other buildings.<sup>21</sup> Finding space was difficult, so, even though it was not ideal, he had no choice but to move one of the elementary school classrooms to a middle school. The Sisson school's portable classrooms are still under repair and unusable, in large part due to delays caused by much higher than expected repair costs.

## **I. DISCUSSION**

The Commission may waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>22</sup> In deciding whether to waive a rule, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>23</sup> Where the 60-day appeal rule is concerned, the party requesting waiver bears more than an ordinary burden to demonstrate that the particular circumstances warrant it.<sup>24</sup> For the reasons set forth and discussed below and elsewhere in this Request, the School District believes strongly that the emergency circumstances that led the School District to miss the deadline, coupled with the arbitrary and capricious nature of USAC's decision, support a waiver of the 60-day appeal rule in this particular instance.

The Commission has observed repeatedly that school district and library officials who manage their organization's E-rate applications are frequently charged with handling numerous other important responsibilities. Moreover, because of how complex and complicated the program has become, E-rate coordinators typically do not possess the very specialized skillset that they need today to navigate successfully through the E-rate program's many twists and turns. Thomas Bourque fits this profile. He is a hard working, extremely dedicated School District official who, on any given day, has numerous important business matters to attend to, and E-rate is only one of them. He has always done his best to understand the program's rules, to keep abreast of rule

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<sup>21</sup> See Exhibit 6 ("\$70G in repairs expected on Lynn school portable"); see also Exhibit 7, describing the threat the snowstorm had posed to area schools generally.

<sup>22</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)

<sup>23</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972).

<sup>24</sup> See *Agra Public Schools Order*, *supra*. at n.2.

changes, to abide by the rules, to respond promptly and thoroughly to USAC inquiries, and to file applications and forms on time. This was a very unusual case for him -- for a couple of reasons. He missed this appeal deadline primarily because of fallout from one of the worst winters in the region's history, but he also missed it, in part and quite frankly, because he was at a loss to understand why USAC had sent this Notice to the School District in the first place. He had no idea how to respond. He was essentially paralyzed. He honestly thought that he had missed something. The notion of saying simply, "We appeal," without much more, without being able to address whatever the issue really was, never even occurred to him. Since USAC is the expert, he thought, maybe its decision was correct. So until he could get some time to focus on it and some help and advice, he decided, he had to put it off.

USAC's decision arrived at the School District's offices at around the same time as the snow really began to hit the fan. Mr. Bourque's emergency duties were engrossing him completely, leaving him very little time for his other work and forcing him to triage whatever else he had on his plate. Moving around students, teachers, instructional materials and equipment, making sure that teachers had everything they needed to teach effectively in their new environments, while helping to address parents' concerns, and at the same time dealing with repair issues, became, in very short order, a logistical challenge of nightmarish proportions. By the time he was able to get back to USAC's decision, unfortunately, too much time had already passed. Since the Notice had arrived at one of the most inopportune times imaginable, and since Mr. Bourque still did not understand the decision, the School District decided to reach out for some professional help. It discussed USAC's decision, the facts leading up to it, and its options with a consulting firm that specializes in the E-rate program, and, as a result, realized that USAC's decision was incorrect and why. In these very unusual and compelling circumstances, the School District should be given the chance to have its appeal heard.

The Commission sets the bar very high where waivers of the appeal period are concerned, in part because the Commission believes that appealing a decision on time is not all that difficult. In theory, that should be the case. As a practical matter, however, when it comes to appealing USAC decisions, we would have to respectfully disagree. It is not, we submit, always that simple. Yes, anyone should be able to follow USAC's instructions and file a piece of paper labeled,

“Request for Review” or “Appeal” with little difficulty. However, because the E-rate rules have become so complicated and changed so frequently over time, and because USAC communicates with applicants so cryptically -- more often than not leaving applicants to guess at what has been decided and why – it should come as no surprise that many E-rate applicants simply freeze when they come face to face with a USAC decision. As a result, one of two things happen: (1) the applicant files a request for review that misses the point, is incomplete, or both; or (2) the applicant gives up. The first option, of course, generates considerably more work for the Commission, eating up valuable staff time and making it increasingly difficult for the Commission to address the most important issues facing it. The second option is incredibly unfortunate and, so far as achieving the program’s goals and objectives are concerned, is an option that the Commission ought to do its best to discourage. When considering requests like this one to waive the 60-day appeal rule, therefore, we urge the Commission to keep these important “realistic” considerations in mind.

Finally, we urge the Commission to consider the arbitrary and capricious nature of USAC’s decision and how that affects the School District’s case for waiver. As we have already discussed, USAC’s decision completely ignored all of the relevant facts and circumstances and all of the evidence in front of its review teams. In its September 29<sup>th</sup> letter, USAC asked the School District to explain the reason for the delay in installing and thus utilizing the equipment. In its January 5<sup>th</sup> decision, it took a completely different and insupportable tack, this time accusing the School District of failing to document that it had ever even used the equipment. These facts offer the Commission a unique opportunity to implement important policy on an individual basis. If the Commission decides not to adhere strictly to its appeal deadline rules, the Commission will have the opportunity to reverse this arbitrary decision and, in so doing, make it less likely, hopefully, that any more decisions like this one will be issued. The ability to implement policy more effectively on an individual basis is, of course, a fundamental ground for granting waiver. Granting a waiver here will accomplish not only that, it will also help the Commission to improve the operation of the program as a whole.

## CONCLUSION

Waiving the Commission's 60-day appeal rule in these circumstances is warranted. Granting a waiver will recognize the incredible demands that emergency situations like the one here place on school district administrators, is equitable and fair, especially considering the arbitrary and capricious nature of the underlying decision, and, furthermore, will enable the Commission to implement important policy more effectively on an individual basis.

For reasons beyond the School District's control, there was a delay of approximately ten months in installing E-rate-supported equipment. When the School District discovered the contractor's mistake that caused the delay, the School District made sure that the equipment got installed quickly. There was no evidence or allegation of waste, fraud, or abuse. In these kinds of circumstances, as the Commission has made clear, USAC should not seek the recovery of funds. Finally, the conclusion that the School District failed to document utilization of two switches and a UPS was made without any regard for the facts, the circumstances or the evidence. Therefore, the School District respectfully requests that the Commission review and reverse USAC's Notice and instruct USAC to stop recovery efforts in connection with this matter.

Respectfully submitted *on behalf of Lynn Public Schools,*

/s/ Cathy Cruzan

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